

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOURNE CO.,

Plaintiff,

-against-

TWENTIETH CENTURY FOX FILM CORPORATION,
FOX BROADCASTING COMPANY, TWENTIETH
CENTURY FOX TELEVISION, INC., TWENTIETH
CENTURY FOX HOME ENTERTAINMENT, INC.,
FUZZY DOOR PRODUCTIONS, INC., THE
CARTOON NETWORK, INC., SETH MACFARLANE,
and WALTER MURPHY,

Defendants.

Case No. 07 Civ. 8580 (DAB)

Deposition of JEREMIAH HORAN, pursuant

to Rule 30(b)(6) Notice, held at the offices of Loeb & Loeb, 345 Park Avenue, New York, New York, on Friday, February 29, 2008, commencing at 9:57 a.m., before James W. Johnson, Registered Professional Reporter and a Notary Public of the State of New York.

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1 Q. Does Bourne have evidence of "I Needed
 2 You" substituting in the market for "When You Wish
 3 Upon A Star?"

4 A. Well, we have the immediate evidence
 5 that we don't have a synchronization license or fee
 6 for the use on "Family Guy." Nor do we have
 7 performance income from that use, but then also, as
 8 stated in Ms. Siroka's report, we don't always,
 9 people don't tell us why they don't use a song, but
 10 these things do affect a potential user's decision
 11 to use the song.

12 Q. Let me clarify the question.

13 Does Bourne have any evidence that any
 14 potential licensor, putting Fox aside for the
 15 moment, that "Family Guy" any other potential user
 16 or licensor or purchaser of songs has chosen to
 17 purchase "I Needed You" instead of purchasing or
 18 licensing "When You Wish Upon A Star?"

19 A. No, we do not.

20 (Horan Exhibit 4, Responses to
 21 Defendant's First Request for Admissions,
 22 marked for identification.)

23 Q. I'm showing you a document that's been
 24 marked as Exhibit 4, which I will represent to you

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1 A. In my opinion, no.

2 Q. So could you explain to me the basis for
 3 the denial of request for admission number 11,
 4 which states, "Admit that," quote, "I Needed
 5 You," end quote, "cannot serve as a substitute in
 6 the market for the song."

7 A. Again, I, I don't know that -- we don't,
 8 Bourne Company doesn't know that somebody, what
 9 somebody could do, so therefore we deny it. We
 10 can't say specifically that it cannot serve as a
 11 substitute in the marketplace for the song.

12 Q. But it's your opinion that it cannot? I
 13 think you just testified to that.

14 MR. FAKLER: Objection, asking for a lay
 15 opinion.

16 A. Again, my personal opinion is that it
 17 cannot.

18 Q. And then let's go to request for
 19 admission number 12, which says, "Admit that
 20 plaintiff," or Bourne, "is not aware of any
 21 instances where a consumer or other potential user
 22 or licensee of this song has purchased, used or
 23 licensed 'I Needed You' instead of the song."

24 What is the basis of the denial of that

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1 is the responses to requests for admissions that we
 2 received from Bourne, and the first question is, do
 3 you recognize it?

4 A. Yes.

5 Q. You've seen it before?

6 A. Yes, I have.

7 Q. Did you participate in its preparation?

8 A. Yes, I did.

9 Q. Okay, could you tell me the basis of the
 10 denial for request for admission number 10 on
 11 page 5, and just so the record is clear, the
 12 request for admission reads, "Admit that," quote,
 13 "I Needed You," end quote, "has not served as a
 14 substitute in the market for the song," the song
 15 being "When You Wish Upon A Star," and what is the
 16 basis for the denial of that request for admission?

17 A. Because we were not aware of any use
 18 does not necessarily mean to us that it has not
 19 been used.

20 Q. In your opinion, would any licensor who
 21 wants to use "When You Wish Upon A Star" think that
 22 "I Needed You" is an acceptable substitute?

23 MR. FAKLER: Objection to the request
 24 for an opinion, a lay opinion.

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1 request for admission?

2 A. Again, we are not aware of any, but we
 3 don't know, so we can't admit that, we cannot say
 4 that there is an instance or not.

5 Q. Mr. Horan, I suggest that you read that
 6 request for admission carefully, because I believe
 7 that it asks, admit that you are not aware of any
 8 instances of substitution, and yet you denied that,
 9 which is denying -- it implies to me that you are
 10 aware of instances of market substitution.

11 Can you explain to me what the basis of
 12 the denial for that request for admission was.

13 A. No, I cannot in that case.

14 Q. Do you agree with me that Bourne does,
 15 is not aware of any instance where a consumer or
 16 other potential user or licensee of the song has
 17 purchased, used or licensed "I Needed You" instead
 18 of the song?

19 MR. FAKLER: Objection, misstates his
 20 prior testimony.

21 MR. ZAVIN: I, I was asking him whether
 22 he agreed with that statement.

23 Q. You can answer the question.

24 A. Would you repeat the question.

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1 Horan
2 this on the grounds that it's outside the
3 scope of the 30(b)(6) notice.
4 MR. ZAVIN: Well, it isn't.
5 MR. FAKLER: How is it within, how is
6 the public association of Walt Disney on this
7 notice? Can you show it to me.
8 DI Q. Mr. Horan, did you ever watch in the
9 1950s the television program "The Wonderful World
10 Of Disney?"
11 MR. FAKLER: I'm going to instruct the
12 witness not to answer. This is way outside of
13 anything on this list.
14 Q. Mr. Horan, are you following the
15 instruction of your counsel?
16 A. Yes, I am.
17 MR. ZAVIN: I have no further questions.
18 MR. FAKLER: Can we take 10.
19 MR. ZAVIN: Sure.
20 MR. FAKLER: Thanks.
21 (Recess taken.)
22 MR. FAKLER: First I'd just on the
23 record like to request that Mr. Horan have the
24 opportunity to review and correct any final
25 transcript of the deposition.
1 Horan
2 in 1998, until 2005 in fact, the only person who
3 would have denied or handled a telephone call
4 requesting a use would have been Beebe Bourne, who
5 has since passed away, B-E-E-B-E Bourne, who died
6 in 2005.
7 MR. FAKLER: That's all I have.
8 MR. ZAVIN: Okay, just very simple.
9 EXAMINATION BY MR. ZAVIN:
10 Q. I just -- I understand that Beebe Bourne
11 died, but your answer remains correct that Bourne
12 as a company does not have any record of the
13 request, a request coming in or what the nature of
14 the request was or why it was denied if it was
15 denied; is that correct?
16 A. That is correct.
17 Q. Okay. And just with respect to your
18 first clarification, is it, does the rest of your
19 answer remain the same, that you, other than the
20 loss of whatever revenue that they might have
21 expected to receive by Fox from the use, Bourne has
22 no evidence of market harm or market substitution?
23 A. That is correct.
24 MR. ZAVIN: Okay, I have no further
25 questions, except I reserve the right to

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1 Horan
2 MR. ZAVIN: Agreed.
3 MR. FAKLER: And so -- thanks, and I
4 have just a little bit of cross here, so to
5 speak.
6 EXAMINATION BY MR. FAKLER:
7 Q. Mr. Horan, having answered a series of
8 questions, is there anything in your testimony that
9 you feel the need, looking back on it, to amplify
10 or clarify?
11 A. Yeah, there were a couple of questions
12 regarding market substitution and harm to the
13 market. In a couple of instances I gave an answer
14 of, if asked if there was any harm I said -- and I
15 guess just an answer -- no, but in those instances
16 I should, should have said that, brought up the
17 loss of revenue from the "Family Guy" use that does
18 affect Bourne Company.
19 And then there was also a question about
20 the, whether or not I was aware of whether or not
21 the, a request from Fox had come in for the use,
22 and I said I was not aware whether or not it came
23 in or what was, whether it was denied or how it was
24 denied.
25 That should be clarified to state that

